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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TEXAS,

Petitioner,

—v.—

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR JASPER JOHNS, ROBERT RAUSCHENBERG, CLAES OLDENBURG, PAUL CONRAD, COOSJE VAN BRUGGEN, MARK DISUVERO, HANS HAACKE, IRVING PETLIN, FAITH RINGGOLD, JENNY HOLZER, MICHAEL GLIER, NANCY SPERO, LEON GOLUB, SOL LEWITT, CARL ANDRE, AND JON HENDRICKS, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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Jasper Johns, Robert Rauschenberg, Claes Oldenburg, Paul Conrad, Coosje van Bruggen, Mark DiSuvero, Hans Haacke, Irving Petlin, Faith Ringgold, Jenny Holzer, Michael Glier, Nancy Spero, Leon Golub, Sol LeWitt, Carl Andre and Jon Hendricks submit this brief as *amici curiae* in support of respondent. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36.2 of the

Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE *AMICI*

The *amici curiae* are renowned artists and one Pulitzer Prize winning editorial cartoonist. The artists' work—sculpture, paintings, constructions, prints, performances—collectively represents the major artistic movements since the 1940's: Abstract Expressionism, Minimalism, Pop Art, Conceptual Art, Performance Art, Political Art, and Feminist Art. Works of these artists are parts of the permanent collections of major museums in the United States and abroad, and all *amici* have exhibited, singly and in group shows, in museums throughout the world. Several have been American representatives to the Venice Biennale, most have participated in one or more Documenta International Exhibitions in Kassel, West Germany, and nearly all have exhibited in the Biennale at the Whitney Museum of American Art. In addition, several have received major fellowships and awards.

Many of the *amici* have used flags in their work. Two of them, Faith Ringgold and Jon Hendricks, were convicted of violating New York's flag desecration statute when they organized a 1970 exhibition of works using the American flag. The works of several other *amici* were shown in that exhibition.

The work of an artist is, obviously, meant to be seen. Artists do not usually communicate through words, but reach their audiences through the use of symbols and recognized images. Elimination of any particular "tool of the trade," as does the Texas statute at issue, necessarily limits the visual vocabulary and stifles the creative process. Accordingly, the *amici curiae* share an intense concern that a government not be permitted to bar or to impose criminal penalties for expression through use of a flag or its image, without advancing the most compelling reasons for doing so.

SUMMARY OF ARGUMENT

Tex. Penal Code Ann. § 42.09 (Vernon 1974) makes it an offense to deface, damage, or otherwise physically mistreat a national flag, knowing that at least one person might be seriously offended by the action. *Amici* contend that the statute violates the First and Fourteenth Amendments because it is vague, overbroad, and not justified by any compelling interest.

1. Due process requires that people not be required to guess at the meaning of a statute, especially a criminal statute. Yet several of the terms of Section 42.09—"seriously offend," "national flag," and "deface, damage, or physically mistreat"—are vague and require such guesswork.

In particular, the "seriously offend" standard is so subjective that it is, in effect, no standard at all. Because "flag" is nowhere defined in the Texas Penal Code, an artist could reasonably conclude that the statute applies not only to three-dimensional flags that might be used in a construction or sculpture, but also to any depiction of a flag on paper or canvas. "Deface, damage, or otherwise physically mistreat," are similarly vague, especially when considered in light of the undefined "flag." The result is that an artist seeking to avoid prosecution is likely to censor his own work and forgo otherwise protected expression.

Because its essential terms are so vague, Section 42.09 neither sufficiently describes the prohibited conduct nor provides guidance about how the provision should be interpreted. The enforcement of the statute is left, therefore, to the personal interpretations of various law enforcement officers, juries, and judges, a result contrary to the Fourteenth Amendment's due process requirements for a criminal statute.

2.A. The Texas flag desecration statute is overbroad because it reaches the clearly protected expression of an artist who employs a flag or the image of a flag. *See, e.g.*, Appendix to this brief ("App.") and material lodged with the Clerk (*see* note 4, *infra*); *see also* Petition for a Writ of Certiorari, Exhibits

A-J, *Long Island Vietnam Moratorium Committee* v. *Cahn*, No. 69-709 (U.S. S.Ct. filed Sept. 16, 1970).

B. Section 42.09 is content-based because, first, as applied to artistic work, the requirement that the proscribed act seriously offend someone necessarily implicates the expressive element of the work, and, second, one of petitioner's rationales for the statute—promoting nationhood and unity—is directly related to expression. *Spence* v. *Washington*, 418 U.S. 405, 414 & n.8 (1974).

C. Because Section 42.09 is content-based, it must be scrutinized closely and can be sustained only if a compelling interest justifies abridgement of free speech. Neither interest petitioner advances—preventing breaches of the peace and promoting nationhood and unity—meets that exacting test.

Petitioner claims that the statute is a measure to prevent breaches of the peace. First, any such purpose justifies interference with protected speech only if limited to conduct likely to produce a clear and present danger. Section 42.09 is not so restricted; it goes well beyond clear and present danger or incitement to include even those quietly displeased—even when not in public. Applied to artistic work, the statute is inapt as a measure for preventing a breach of the peace because such work is often not displayed where those likely to be offended will see it. Second, the facts of this case belie petitioner's law enforcement rationale. After a demonstration that allegedly included acts of destruction and theft of property, petitioner prosecuted no one for any conduct except flag desecration.

Petitioner also claims that the statute is necessary to promote nationhood and unity, but advances no reason to explain how Section 42.09 promotes those interests. Any explanation must be based, however, on the false premise that the nation and its symbol, the flag, are identical and thus harm to a flag is tantamount to harm to the nation. Yet, while this Court has recognized that free speech might yield to the interest of national security under some special circumstances, petitioner cannot seriously claim that an artist's use of a flag in an unorthodox

fashion threatens the nation as would, for example, the truthful report of troop movements during wartime.

ARGUMENT

I

THE VAGUENESS OF THE TEXAS FLAG DESECRATION STATUTE VIOLATES THE FOURTEENTH AMENDMENT

Tex. Penal Code Ann. § 42.09 (Vernon 1974) ("Section 42.09" or "the flag desecration statute" or "statute") states in pertinent part:

> Desecration of Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> • • • •
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.[1]

Thus, an individual violates Section 42.09 if he consciously defaces, damages, or otherwise physically mistreats a state or national flag and is aware that one or more persons likely to observe or discover his action is likely to be seriously offended.

The flag desecration statute violates the Fourteenth Amendment because several of its elements, as interpreted by the Texas courts, are so vague that they provide no standard for determining what conduct is proscribed. *Boos* v. *Barry*, 108 S.Ct. 1157, 1164 (1988); *Hustler Magazine* v. *Falwell*, 108 S.Ct. 876, 881-

1 "Intentionally" and "knowingly" are defined in Tex. Penal Code § 6.03(a) and (b) respectively.

882 (1988); *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974); *Gooding* v. *Wilson*, 405 U.S. 518, 527 (1972); *Cohen* v. *California*, 403 U.S. 15, 25 (1971); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). In particular, the terms "seriously offend", "national flag" (assuming in this case that it refers to the flag of the United States of America), and "deface, damage, or otherwise physically mistreat", read either alone or together with other elements, are not sufficiently clear to give the requisite constitutional notice of what conduct is permitted and to provide adequate guidance to law enforcement officers so as to prevent arbitrary and discriminatory enforcement. *Goguen*, 415 U.S. at 572-573, 574-576.

Moreover, the inadequacies of the statute weigh particularly heavily upon those like *amici* whose expression often consists of symbols and well-known pictorial devices (such as a flag) and whose creative efforts are not interpreted alike by everyone. Or, to modify *Goguen* slightly, " '[w]hat is [offensive] to one man may be a work of art to another.' "[2] People of common intelligence should not be required to guess at the meaning of a statute, especially a criminal statute (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926)), nor should the creative process suffer from the inhibition that such guesswork demands. Yet the vagueness of the Texas flag desecration statute demands exactly such guesswork.[3]

A. To "Seriously Offend One Or More Persons Likely To Observe Or Discover His Action" Is An Unascertainable Standard.

Section 42.09 only proscribes conduct that "the actor knows will seriously offend one or more persons likely to observe or

2 *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974), quoting Note, *Constitutional Law, Freedom of Speech, Decoration of National Symbols of Protected Political Expressions*, 66 Mich. L. Rev. 1040, 1056 (1968); *see Winters* v. *New York*, 333 U.S. 507, 510 (1948).

3 Even if the Court were to determine that Section 42.09 is not vague as applied to respondent's conduct, it may still address *amici*'s vagueness argument. *New York State Club Assn., Inc.* v. *City of New York*, 108 S.Ct. 2225, 2233 (1988); *Goguen* v. *Smith*, 471 F.2d 88, 91-92 & n.7 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974).

discover his action." "Offend" means "to cause pain to", "to cause to feel vexed or resentful: hurt the feelings of", and its synonyms are "affront", "insult", and "outrage." Webster's Third New International Dictionary 1566 (Springfield, Mass.: G & C Merriam Co. 1981) ("Webster's"). Thus, a person is subject to prosecution under the statute if his treatment of a flag is likely seriously to vex or to affront even one person.

This is precisely the kind of vague standard condemned in *Goguen*, *Coates*, *Hustler*, *Boos*, *Gooding*, and *Cohen*. It is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 612, 614 (finding vague an ordinance prohibiting conduct "annoying to persons passing by"); *Hustler*, 108 S.Ct. at 882 (in a civil action, " '[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression"); *Boos*, 108 S.Ct. at 1164 (holding that the interest in protecting the "dignity of foreign diplomatic personnel," like the "outrageous" standard rejected in *Hustler*, is too inherently subjective); *Goguen*, 415 U.S. at 578 (holding "treats contemptuously" vague); *Gooding*, 405 U.S. at 527 ("tending to a breach of the peace" leaves wide open the standard of responsibility); *Cohen*, 403 U.S. at 25 (statute proscribing "offensive conduct" may not be used to proscribe particular words; "one man's vulgarity is another's lyric").

No one could predict with any confidence what expressive conduct involving a flag would be likely to seriously offend at least one other individual. For many people, such as the officers who testified at respondent's trial, conduct they deem disrespectful of the flag will seriously offend them. Indeed, it is likely that for many people, any unconventional or nontraditional depiction of the flag—however favorable to the flag and the nation—might seem disrespectful or in bad taste and thus offensive.

So, for example, Paul Conrad's political cartoon that illustrates "The American Way of Death" by depicting a razor blade cutting lines of cocaine upon a flag (App. 10a) could seriously offend someone who believes that it is disrespectful to associate illegal drugs with the flag. Another person might be seriously offended by a depiction of the flag in which the stars in the union are represented by photographs of well-known Hollywood personalities such as Mickey Mouse, Johnny Carson, and Elizabeth Taylor. *See* K. Hinrichs, Stars & Stripes 98 (San Francisco: Chronicle Books 1987).[4] Similarly, the paintings of Jasper Johns (App.3a, 9a), which use the flag because it is a recognizable image, could seriously offend someone who thinks that using the flag as an object in an artistic work is inappropriate.

The "seriously offend" standard of the Texas statute is no standard at all because it is subject to the particular tastes, views, or whims of different individuals. *Coates*, 402 U.S. at 614. It depends—as do "offensive", "outrageous", or "affronting dignity"—solely upon the reactions of third parties, a test so amorphous that an artist wishing to avoid prosecution would have to censor his work to the point of virtually forgoing the use of a flag. Moreover, such a standard, as in *Hustler*, allows a jury to impose liability on the basis of the jurors' tastes or views. These vices, both of which inhere in the Texas flag desecration statute, are incompatible with the protections of the Due Process Clause.

B. What Is A Flag?

At first blush, the question "what is a flag?" in the context of a flag desecration statute might seem odd. But in a day when people rise before major league baseball games to The Star Spangled Banner and salute a two-dimensional representation of the flag projected upon a giant video screen or light board

4 Copies of K. Hinrichs, Stars & Stripes 3 (San Francisco: Chronicle Books 1987) (interpretations of the flag by 96 illustrators and graphic artists "asked to interpret one of the world's most charged symbols") have been lodged with the Clerk of the Court.

and "in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it" (*Goguen*, 415 U.S. at 574), the question is not at all frivolous, especially when an artist depicting a flag could be subject to criminal liability depending upon the answer.

The determination of the meaning of the term "flag" in Section 42.09 is bound up with the issue of what a flag is in general, whether it symbolizes something, and why the United States flag has become so venerated that desecration is penalized. Thus, before turning directly to the particular language of the Texas flag desecration statute, it is worthwhile considering the role of the United States flag as a symbol.

1. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943). "Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech or gestures." *Goguen* v. *Smith*, 471 F.2d 88, 99 (1st Cir. 1972).

The strength of the stars and stripes as a potent, often moving, symbol of America cannot be disputed. We are a nation that pledges allegiance first "to the Flag" and then "to the Republic for which it stands." 36 U.S.C. § 172. The flag does not, however, necessarily symbolize a particular point of view, nor even always the unity of the nation. "It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent oppostion to government. Always it represents America—in all its marvelous diversity." *Parker* v. *Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court).

Because the flag is so powerful a symbol of the nation, it is at times mistaken for the nation. 36 U.S.C. § 176(j) ("The flag

represents a living country and is itself considered a living thing"). However the flag's referent, the country or nation, exists apart from the symbol. Its strength depends upon the strength of the principles it represents, not upon the expressive "misuse" of some particular flag which symbolizes it. As with any symbol, the flag continues to serve its symbolic function even if one flag, one representation of the symbol, is destroyed. In other words, a change in the physical character of one flag—any flag—does not "interfere with its design and function." *Goguen*, 415 U.S. at 587 (White, J., concurring).

For this reason, flags cannot properly be compared to the Lincoln Memorial. *Goguen*, 415 U.S. at 587 (White, J., concurring). Although the Lincoln Memorial is an awe-inspiring symbol of freedom, especially racial freedom, Congress is empowered to protect the integrity of the physical monument not because it is a symbol, but because it is public property. Similarly, Congress is empowered to make laws protecting particular flags owned by the government, because, in addition to their symbolic function, they are the government's tangible property. However, *amici* contend that any law aimed at preventing the use of a replica of the Lincoln Memorial, or a depiction of it, as part of symbolic expression would suffer the same infirmities as does the Texas flag desecration statute.

2. "From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States." 415 U.S. at 601 (Rehnquist, J., dissenting). As the Appendix to this Brief, the material lodged with the Clerk, and the examples noted by Justice Rehnquist (*id.*) illustrate, the history of the United States is rich with pictorial representations of the flag. This includes work in the fine arts, graphic arts, the art of the editorial cartoonist, and the decorative art of early America. *See also* Petition for a Writ of Certiorari, Exhibits A-J, *Long Island Vietnam Moratorium Committee* v. *Cahn*, No. 69-709 (U.S. S.Ct., filed Sept. 16, 1970).

In some of these contexts, the flag has been used as a symbol for the United States, sometimes to express positive sentiments, sometimes not. In other contexts, however, the flag has served

simply as a well-known device that permitted the artist to express other ideas.[5] Whatever its use, however, it has served as a vehicle of artistic expression.

3. Against this background concerning the use of flags and the American flag as a symbol or artistic device, we turn to the meaning of "flag" in Section 42.09. "Flag" is defined nowhere in the Texas Penal Code. Given the enormous versatility of flags in artistic expression, this statutory gap presents serious problems for an artist seeking to avoid prosecution. The statutory language "a national flag," which uses the indefinite article, implies that the statute applies to the flag of any nation, and not only a United States flag.[6] Assuming for argument that the statute applies only to the national flag of the United States, the statutory language gives no guidance about whether "flag" refers only to three-dimensional flags of the sort usually hung from a standard or also includes two-dimensional depictions in paintings, posters, or sewn into quilts. The statute does not even indicate whether it extends to all flags the United States has ever had or only to the one currently in force. *See Goguen*, 415 U.S. at 570 n.3, 578-579 & n.24. For those, like artists, playwrights, editorial cartoonists, and movie makers, whose expressive vocabulary is dependent upon visual symbols and devices, this is not an academic inquiry.[7]

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5 *See* Museum of Modern Art, Sixteen Americans 22-27 (New York 1959); *see also* H. Rosenberg, *Jasper Johns: "Things the Mind Already Knows"*, The Anxious Object 177 & n.* (Chicago: The University of Chicago Press 1966) (" 'I went on [from the American flag] to similiar things like targets, things the mind already knows, that gave me room to work on other levels' "); H. Rosenberg, *Twenty Years of Jasper Johns*, Art and Other Serious Matters, 132, 134 (Chicago: The University of Chicago Press 1985).

6 Because we believe that the statute is defective as applied to the United States flag, we do not elaborate on this point. We do wonder, however, what interest petitioner has in protecting the flag of a foreign nation such as Iran or Libya.

7 Even if the statute were intended to include only three-dimensional flags, it would have a particularly harmful impact upon those artists—sculptors, actors, movie directors—whose artistic expression is necessarily three-dimensional.

One Texas case interpreting "flag" holds that the statute applies "just as forcefully whether the object burned is an actual flag or is an imitation so similar that persons viewing the scene would not be aware of the difference." *Deeds* v. *Texas*, 474 S.W.2d 718, 721 (Tex. Crim. App. 1971).[8] Although that court's use of the word "object" suggests a three-dimensional flag, the remainder of its holding could support the inference that the statute reaches an artist's two-dimensional depiction as well.

One seeking guidance might logically consult the United States Code to find the definition of the United States flag. The federal flag desecration statute supports the conclusion that the reach of the word "flag" could encompass nearly any configuration of stars and stripes—two- or three-dimensional—that the average person might think is a flag or a picture of a flag. 18 U.S.C. § 700.[9] There is nothing in the Texas flag desecration statute or any legislative history that dispels the ambiguity

8 *See Goguen*, 415 U.S. at 578-579 & n.24 regarding the "ambiguities presented by the concept of an 'actual' flag." Although Goguen argued that the flag sewn to the seat of his pants was not a flag within the meaning of the statute, the Massachusetts Supreme Court disagreed. *Id.* at 579 n.24.

9 18 U.S.C. § 700(b) provides that the flag of the United States

> shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

See Parker v. *Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court) ("The definition of a flag in the North Carolina statute is simply unbelievable * * * Read literally, it may be dangerous in North Carolina to possess anything red, white and blue. Such a definition is a manifest absurdity"); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344, 347-348 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974).

about whether the statute also encompasses depictions of a flag.[10]

It is impossible to reach a definitive conclusion about the meaning of "a national flag" in the Texas flag desecration statute. Therefore, as with the meaning of "seriously offend," an artist wishing to avoid the statute's sanctions would be forced to guess about the scope of the statutory terms. Rather than run the risk of prosecution, an artist operating under such an unclear statute is likely to forgo protected expression. A statute that provokes such a response is impermissibly vague.

C. "Deface, Damage, Or Otherwise Physically Mistreat"

The portion of Section 42.09 that purports to define the proscribed conduct, especially when read with the undefined "a national flag," is similarly vague.

The use of the phrase "otherwise physically" may suggest that all three verbs describing the proscribed conduct are related and that they refer only to three-dimensional objects. This conclusion is at odds, however, with the definitions of the three verbs. "Deface" means to "destroy or mar the face or external appearance of" something (Webster's at 590), and "damage" means "to hurt, injure, [or] impair" something (*id.* at 571). Both of these definitions just as easily contemplate works of art involving two-dimensional depictions of flags as they do three-dimensional flags. They could include a flag drawn with a tear as a metaphor for the condition of the country (App. 6a) or a flag that intersperses recognizable parts of the flag's design with other images or designs (App. 5a). "Mistreat" means "to treat badly: abuse." *Id.* at 1446. Given these definitions, Vito Acconci's "Instant House", whose interior walls are United States flags with windows and doors cut through (App. 20a), or

10 If Section 42.09 reaches only three-dimensional flags, then burning a flag as respondent did would be proscribed, but the photograph or sketch on the cover of a magazine of the same flag burning would not. *See Korn* v. *Elkins*, 317 F. Supp. 138, 142-143 (D. Md. 1970) (three-judge court) (holding unconstitutional the Maryland flag desecration statute as applied to the cover of a university magazine that depicted a burning American flag).

a flag painted on a man's face or on a nineteenth century farm gate (App. 4a, 8a) could constitute desecration under Section 42.09.[11]

Moreover, "mistreat," like the word "abuse" that defines it, implies a standard of acceptable treatment. Thus, a police officer might conclude that violation of one of the rules and patriotic customs pertaining to the display and use of the flag (36 U.S.C. §§ 174-176) was physical mistreatment, chargeable as flag desecration, even though those rules by themselves carry no penalties. *See Hoffman* v. *United States*, 445 F.2d 226, 230 (D.C. Cir. 1971) (MacKinnon, J., concurring). For example, superimposing figures on the bleeding flag (App. 18a), contrary to custom (36 U.S.C. § 176(g)), could constitute defacement or physical mistreatment which, if it seriously offended someone who saw it, would fall within the statute.

As demonstrated, the language of Section 42.09 is so vague that the actor cannot know what conduct is proscribed. The enforcement of the statute is therefore left to the personal interpretation of law enforcement officers, judges, and juries, a result repugnant to the Fourteenth Amendment, which should not be sanctioned.

II.

THE TEXAS FLAG DESECRATION STATUTE IS OVERBROAD AND THUS VIOLATIVE OF THE FIRST AMENDMENT

A. Section 42.09 Reaches Protected Artistic Expression

A statute is overbroad if it sweeps into its orbit a wide variety of activity protected by the First Amendment. *Boos*, 108 S.Ct.

11 *See Goguen*, 415 U.S. at 570 n.4, quoting 471 F.2d at 91 n.4, where, speculating about why Goguen was not charged with any act of "physical desecration," this Court acknowledged the difficulty of applying the statutory terms "mutilates, tramples upon [and] defaces" and observed " 'we are not so sure that sewing a flag to a background clearly affects "physical integrity" ' ").

at 1168.[12] No one can seriously contest the proposition that an artist's work—whether it employs a two- or three-dimensional flag, whether it employs it as a symbol of the nation or simply as a well-recognized device (*see*, note 5, *supra*), and whether or not it is intended to have political connotations—is work "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]." *Spence* v. *Washington*, 418 U.S. 405, 409 (1974).

"The Court for decades has recognized the communicative connotations of the use of flags", including the United States flag (*Spence*, 418 U.S. at 410, citing *Stromberg* v. *California*, 283 U.S. 359 (1931), and *Barnette*, 319 U.S. at 632); it has also acknowledged the use of the United States flag in the country's art history (*Goguen*, 415 U.S. at 601-602 (Rehnquist, J., dissenting)).[13] And, to the extent that some works of art fall into the category of "protest art" they follow in an "established artistic tradition . . . exemplified by the works of such artists as Michelangelo, Goya and Picasso." *People* v. *Radich*, 26 N.Y.2d 114, 126, 308 N.Y.S.2d 846, 855, 257 N.E.2d 30, 37 (1970), (Fuld, J., dissenting), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *United States ex rel. Radich* v. *Criminal Ct. of New York*, 385 F. Supp. 165, 168 (S.D.N.Y. 1974).

Section 42.09, given the vagueness of its terms, could sweep within its ambit nearly all the artistic creations that have ever used or depicted a flag. It would include Jasper Johns's paintings of flags (*see*, *e.g.*, "Three Flags" (App. 3a), "Morato-

12 In making this assessment, the vagueness of the statute, because it lends itself to a broader statutory reach, "affects overbreadth analysis." *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982).

13 The Court has also recognized the use of other flags as a symbol of opposition. *See*, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359 (1931) (red flag displayed as symbol of opposition to organized government). In different contexts, artists have made eloquent statements using the flag of various nations as forms of protest. *See*, *e.g.*, John Heartfield's powerful use of the flag of Nazi Germany (App. 23a) or Hans Haacke's "Apartheid" which makes use of the flags of both the African National Congress and the Republic of South Africa on the same standard, the former flying freely and the latter knotted (App. 22a).

rium" (App. 11a), and "White Flag" (App. 9a)); Claes Oldenburg's "Heel Flag" (App. 13a); political cartoons of Herblock (App. 7a, 19a) and Paul Conrad (App. 10a); Faith Ringgold's "Flag for the Moon—Die Nigger" (App. 15a) and "The Flag is Bleeding" (App. 18a) and the artistic constructions that were at issue in *Radich*, 385 F. Supp. at 168.

The statute would similarly encompass much of the work of any art exhibition devoted to the use of the flag such as the 1970 "The People's Flag Show" at the Judson Memorial Church in Manhattan;[14] "Stars and Stripes," organized by the San Francisco chapter of the American Institute of Graphic Arts to coincide with the 100th anniversary of the Statue of Liberty;[15] or the 1988 exhibit in Rotterdam of fifty artists' flags.[16]

The reach of the Texas flag desecration statute is not limited to fine artists or editorial cartoonists. It is equally likely to encompass the work of a movie actor burning a flag in a movie about the student antiwar protests of the 1960's. *See Schacht* v. *United States*, 398 U.S. 58, 60 (1970) (holding unconstitutional penal statutes that authorized the wearing of a United States military uniform in a theatrical production, but only "if the portrayal does not tend to discredit that armed force").

Moreover, the fear of prosecution is not speculative. Artists and their dealers have been prosecuted for using the flag in their works despite their clearly expressive intent.[17] The inescapable

14 *See Hendricks* v. *Hogan*, 324 F. Supp. 1277, 1279-1280 (S.D.N.Y. 1971); The Village Voice, Nov. 19, 1970, at 1, 20-21; App. 24a.

15 *See* K. Hinrichs, note 4, *supra*.

16 Gran Pavese, The Flag Project: 50 Artists/50 Flags (The Hague, The Netherlands: SDU Publishers 1988), including those flags reproduced at App. 5a, 22a.

17 *See, e.g.*, *People* v. *Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *United States ex rel. Radich* v. *Criminal Ct. of New York*, 385 F. Supp. 165, 168 (S.D.N.Y. 1974) (holding unconstitutional statute under which art gallery dealer was convicted for exhibiting three constructions using the flag); *People* v. *Keough*, 31 N.Y.2d 281, 338 N.Y.S.2d 618, *rev'g on nonconstitutional grounds* 38 A.D.2d 293, 329 N.Y.S.2d 80 (1972); *People* v. *Hendricks*, Crim. No. B36653 (N.Y. Crim. 1971) (convicting two of the *amici*), and *Hendricks* v. *Hogan*, 324 F. Supp. 1277, 1280 (S.D.N.Y. 1971) (denying motion to convene three-judge court to preliminarily enjoin state criminal prosecution).

conclusion is that the basis for these prosecutions against artists and their dealers was the personal belief of law enforcement and judicial officials that use of the flag to express unpopular views was, in the terms of the Texas flag desecration statute, "seriously offen[sive]."[18] The reaction of one appellate judge to a photograph created by students for a university publication is an example of just such motivation: "Displaying the flag in this disgusting fashion [partially draping a nude female figure in the flag] . . . dishonored [the flag]. If these defendants have a sincere ideological motive, they should find other means or ways to express it." *People* v. *Keough*, 38 A.D.2d 293, 295; 329 N.Y.2d 80, 82, *rev'd on nonconstitutional grounds*, 31 N.Y.2d 281, 338 N.Y.S.2d 618 (1972).[19]

Because Section 42.09 penalizes uses of a flag in the expression of artists, the statute "sweeps too broadly." *Gooding*, 405 U.S. at 527; *Street* v. *New York*, 394 U.S. 576, 592 (1969).[20]

18 Confirming the conclusion that this and other flag desecration and misuse prosecutions have been brought primarily to censor the expressive content of the conduct is the fact that the vast majority of such cases have arisen in the context of the expression of views hostile to the prevailing political climate. *See Goguen*, 471 F.2d at 102 (admission of government's counsel that a war protestor's use of a flag as a shield from the rain would be prosecuted but the same use by a member of the American Legion would not).

19 Of course, this Court has rejected the notion that First Amendment interests may be abridged on the ground that they may be exercised in some other place or manner. *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974).

20 Because the Texas courts held, and petitioner has never challenged, that respondent's act of burning the flag was protected speech within the First Amendment, then, for the reasons described in Parts II.B and II.C of this brief, the Texas flag desecration statute also violates the First Amendment as applied to respondent's conduct.

B. Section 42.09 Is Content-Based Legislation

When expression involves conduct rather than "pure speech," then, as then-Judge Scalia has observed, whether the First Amendment is implicated depends upon "the threshold inquiry of whether the purpose of the law is to suppress communication. • • • [I]f so, the court *then* proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases." *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 623, 625 & n.18 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 468 U.S. 288 (1984) ("*CCNV*"); *Spence*, 418 U.S. at 414 n.8; *Kime* v. *United States*, 459 U.S. 949, 952-953 (1982) (Brennan, J., dissenting from denial of certiorari).

Section 42.09 is content-based, despite petitioner's claims to the contrary (Br. 39), first because it proscribes only those works that the actor knows will seriously offend at least one person who observes them. Therefore, the artist is penalized not solely for his conduct, but for the expression embodied in the work. Justice White has already stated why such a result is impermissible.

> To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.

Goguen, 415 U.S. at 588 (White, J., concurring); *see Schacht*, 398 U.S. at 93; *Kime*, 459 U.S. at 956 (Brennan, J., dissenting from denial of certiorari); *Hustler*, 108 S.Ct. at 882; *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection").[21]

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21 Moreover, even if *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970), did not bar petitioner's argument that the Court could save the statute by deleting the "seriously offend" language (Br. 48-50), *amici* contend that the Texas flag desecration statute would still be content-based. "The *only* reason [to regulate the display and use of the] United States flag [is] related to the communicative content of the flag." *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 625 (D.C. Cir. 1983) (emphasis added) (Scalia, J., dissenting), *rev'd*, 468 U.S. 288 (1984); *Goguen*, 471 F.2d at 99 ("But when the object is a pure symbol, such as the flag . . . any individualized activity with regard to it [except maintaining and storing one] is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech' ").

Section 42.09 is also content-based because one of petitioner's rationales for the statute—that it promotes nationhood and unity (Br. 24)—"is directly related to expression . . . ." *Spence*, 418 U.S. at 414 & n.8 (if the state's interest is protecting the flag as a symbol of the country "it is directly related to expression" and "the four-step analysis of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) is inapplicable"); *id.* at 420-421 (Rehnquist, J., dissenting); *Kime*, 459 U.S. at 952-953 (Brennan, J., dissenting); *CCNV*, 703 F.2d at 625 & n.14 (Scalia, J., dissenting).

Petitioner tries to escape the conclusion that the statute is content-based by claiming that it seeks only to protect the flag as a symbol, regardless of the viewpoint expressed, and that the "offended observer" standard favors no particular viewpoint because it is geared to the reactions of third-parties (Br. 20-24, 40, 43-45). The Court was unpersuaded by a similar argument in *Boos*. There a District of Columbia statute forbade picket signs near foreign embassies that tended to bring a foreign government into public odium or public disrepute. 108 S.Ct. at 1162. The government argued that the statute was content-neutral because it was directed at no single ideological position, *i.e.*, whether speech was prohibited in any particular case was determined solely by the policies of the foreign government. 108 S.Ct. at 1162-1163.

This Court rejected the argument. "[A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible" if it has the effect of proscribing an entire category of speech. *Id.* at 1163.[22] The same applies to Section 42.09

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22 Petitioner's admission that the statute proscribes conduct that is intended to offend (Br. 44) belies its disclaimer that the statute's "serious offense" language is "narrowly tailor[ed]" to separate the actor's intent

which has the effect of eliminating one symbol of enormous emotive force from the artist's expressive vocabulary.

C. Petitioner Advances No Compelling Justification For Its Infringement of Protected Expression

Because Section 42.09 is content-based, it "must be subjected to the most exacting scrutiny." *Boos*, 108 S.Ct. at 1164. Neither of the rationales that petitioner identifies—avoiding breaches of the peace and protecting the flag as a symbol of national unity—qualifies as a sufficiently compelling interest to justify abridgement of free speech.

1. A state's interest in preventing a breach of the peace does not justify interference with protected speech "unless [the speech is] shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). The Texas flag desecration statute does not meet this standard.

In the first place, Section 42.09 is not restricted to conduct likely to produce an imminent breach of the peace. The statute goes far beyond "clear and present danger" or "incitement." It covers those quietly displeased—even when not in public. Petitioner's disorderly conduct statute—which proscribes certain language and gestures if they tend to incite an immediate breach of the breach (Tex. Penal Code § 42.01(a)(1) and (2)—shows that if petitioner intended to proscribe conduct likely to incite an imminent breach of the peace, it was capable of writing a statute aimed at such conduct.[23] Thus, its failure to do so in Section 42.09 confirms that the statute was not intended to be so limited.

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from the reaction of the crowd (*id.*). Justice Brennan's ironic observation about the federal flag desecration statute applies equally here: "This is indeed a narrowly drawn statute; it is drawn so that everything it might possibly prohibit is constitutionally protected expression." *Kime*, 459 U.S. at 954.

23 Nor could Texas claim that the flag burning in this case amounted to "fighting words" in the sense that anyone who witnessed the event would be inherently likely to erupt in violent reaction. *Street* v. *New York*, 394 U.S. 576, 592 (1969); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942); *Cohen* v. *California*, 403 U.S. 15, 20 (1971). The witnesses at trial testified that they were offended, but none of them was moved to violence. Furthermore, two of the witnesses who testified that they were offended were police officers, presumably trained not to respond easily to provocations encountered during their work. In addition, the flag burning occurred in the midst of a group of demonstrators who apparently supported the views reflected by respondent's action. In any event, the likelihood was slim that the act of burning the flag would, under the circumstances, provoke anyone to violent conduct.

And, if petitioner's concern is the protection of the public against the danger of fire, it can certainly enact a statute aimed at the burning of any property, not just flags, under circumstances likely to endanger public safety. *See* Tex. Penal Code Ann. § 28.02(a) (Vernon Supp. 1988) relating to the burning of a building, habitation or vehicle.

Indeed, as explained above, this statute is likely to reach the conduct of artists whose work is typically exhibited in circumstances that are unlikely to lead to a breach of the peace, even if an observer is offended by them. For example, the constructions that provoked the arrests in *Radich* were seen from the street by police officers who saw them "displayed in the quiet surroundings of [an] upstairs art gallery on Madison Avenue in midtown Manhattan." 26 N.Y.2d at 127, 308 N.Y.S.2d at 856, 257 N.E.2d at 38 (Fuld, J., dissenting). Thus, petitioner's breach of the peace rationale has little force when applied to much of the artistic work that the statute potentially proscribes. *State* v. *Kool*, 212 N.W.2d 518, 521 (Iowa 1973) (peace symbol on upside down flag held unlikely to provoke breach of peace); *People* v. *Von Rosen*, 13 Ill. 2d 68, 147 N.E.2d 327, 329 (1958) (breach of peace unlikely result of magazine illustration depicting nude woman in hat, sunglasses, and flag covering pubic area).

Moreover, the facts of this case belie petitioner's claim that Section 42.09 is necessary to protect against breaches of the peace. The flag burning at issue here coincided with the 1984 Republican Convention in Dallas and occurred toward the end of a political demonstration dubbed the "Republican War Chest Tour" that took the demonstrators to the headquarters of several corporations to protest the policies of the Reagan

administration and certain Dallas corporations. Undercover police officers accompanied the demonstrators, and uniformed police officers were asssigned to observe the tour. According to petitioner (Br. 3-5), in the course of the tour, potted plants were overturned and uprooted, bank deposit slips were torn up, a flag was stolen, and walls were spray-painted. The tour terminated at the plaza in front of the Dallas City Hall where the flag burning occurred in a circle of protestors, police officers, and some passersby.

So far as the record shows, in the course of this demonstration, no one was arrested for criminal mischief. Tex. Penal Code Ann. § 28.03 (Vernon 1974 and Supp. 1988). No one was arrested for reckless damage or destruction of property. *Id.* at § 28.04. No one was arrested for theft. *Id.* at § 31.03 (Vernon Supp. 1988). The only prosecution arising from this demonstration was for desecration of the American flag. In other words, despite observing several incidents of destruction and theft of property and despite petitioner's concession that the statutes cited above were applicable (Br. 35), the only charge prosecuted—in the interest of preserving the peace—was desecration of the flag.

In the circumstances of this case, to justify Section 42.09 as a measure for preventing breaches of the peace is patently absurd and mocks legitimate and responsible law enforcement. The inescapable conclusion is that petitioner's concern was not preservation of the peace, but penalizing respondent for the particular views he expressed.

Petitioner has advanced no valid reason why its need to protect against breaches of the peace requires abridging expression protected by the First Amendment by means of Section 42.09.

2. Petitioner's other rationale—the need to protect the flag as a symbol of nationhood and unity—fares no better. No one seriously disputes that the federal government has an interest in adopting a flag (4 U.S.C. §§ 1-2), establishing customs for its use (36 U.S.C. §§ 173-178), and ensuring that its use is not claimed exclusively by any one entity (15 U.S.C. § 1052(b) (no trademark can be registered if it "consists of or comprises the

flag . . . of the United States")).[24] However, petitioner advances no reason why the government's interest in the flag should spread any wider.[25]

Though couched in terms of the symbol of the nation, petitioner's argument mistakenly confuses the symbol, the flag, with its referent, the nation, thereby implying that the nation itself is somehow in jeopardy unless the government bars all dissenting and offending uses of the flag. Yet, while the Court has suggested that free speech might yield to the national security under some exceptional circumstances (*see New York Times Co.* v. *United States*, 403 U.S. 713, 723 (1971) (Douglas, J., concurring); *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931)), petitioner cannot claim that an artist's use of the flag in an unorthodox fashion threatens the nation as would the truthful report of troop movements during a time of war.

Petitioner contends that Section 42.09 is necessary in order to ensure that the flag "survive to represent and symbolize this country and its uniqueness as a governmental entity" (Br. 28). Petitioner never explains why Section 42.09 is essential to this result, but implicit in its argument is the view that the flag

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24 Nor does the government's authority to bar a particular entity from having an exclusive trademark in a nation's flag lead to the conclusion that Congress is thereby empowered to bar all expressive use of the flag. *See* Brief of the Washington Legal Foundation et al., *amici curiae*, Supporting Petitioner at 25, relying upon *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 107 S.Ct 971 (1987). The outcome of that case depended in large part upon the holding that the speech at issue was commercial, the effect of the statute was unlikely to reach beyond the parties before the Court, and the United States Olympic Committee was not a governmental actor to which the First Amendment applies. 107 S.Ct. 2980-2981 & n.15, 2983, 2985. The same cannot be said of petitioner's effort to suppress expressive use of the flag.

25 While the interest of the federal government in matters relating to the United States flag is obvious, petitioner's interest is not so clear. *But see Halter* v. *Nebraska*, 205 U.S. 34, 39 (1907); however, *Halter* was decided before the protection of the First Amendment had been extended to commercial speech or to the states through the Fourteenth Amendment. The Court need not resolve this issue, however, because regardless of petitioner's legislating authority, *amici* maintain that petitioner has not advanced a compelling reason for infringing protected speech.

should be identified with the majority view and that nationhood and unity can only be achieved by cutting off any symbolic use of the flag associated with dissent or critical expression. If we take minor liberties with his words, the observation of Justice Jackson still applies:

> To believe that patriotism will not flourish if [the American flag is used symbolically as a form of protest] is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. • • • But freedom to differ is not limited to things that do not matter much.

Barnette, 319 U.S. at 640, 641-642; *see Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 n.8 (1974), quoting Thomas Jefferson's first inaugural address; *see also*, M.B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 56-57 (1973).

With the same confidence in "the appeal of our institutions to free minds," this Court has also acknowledged "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Street*, 394 U.S. at 576; *Spence*, 418 U.S. at 422 (Rehnquist, J., dissenting).[26] But if nationhood and unity will not be diminished by words spoken against the flag, there is no reason, and petitioner has offered none, why nationhood and unity are any more likely to suffer because the same sentiments are expressed using the flag as a symbol. Indeed, to the extent that people are proud

26 In the libel and related contexts, this Court has recognized that ensuring that public debate shall be "uninhibited, robust and wide-open" requires acceptance of "vehement, caustic, and sometimes unpleasantly sharp attacks" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)), "offensive" speech (*Hustler Magazine* v. *Falwell*, 108 S.Ct. 876, 882 (1988)), "pernicious opinion" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)), and "rhetorical hyperbole" (*Greenbelt Co-op Pub. Assn.* v. *Bresler*, 398 U.S. 6, 14 (1970)). And, to the extent that a flag desecration statute is a guise for restricting criticism of the government, it resembles seditious libel and should be treated similarly. *See Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153-154 (1967) (plurality).

of, and derive a sense of national unity from, the nation's First Amendment protection of dissenting and contrary views, measures which are used to suppress such views, such as Section 42.09, are themselves likely to weaken those feelings of national pride.

This Court has been vigilant against efforts to censor particular expression, whether specific words (*Cohen*, 403 U.S. at 26), or symbols (*Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 510-511 (1969) (regulation against black armbands only and no other symbol violative of First Amendment)). The rationale for that vigilance is that once government penalizes the use of particular words or symbols because they are deemed offensive, "government might soon seize upon the censorship of particular words [or symbols] as a convenient guise for banning the expression of unpopular views." *Cohen*, 403 U.S. at 26. Although justified as a means of promoting nationhood and unity, Section 42.09 operates as "a convenient guise" for censoring a particular image. Applied to artists, it has the effect of banning from their visual vocabulary a symbol "often chosen as much for [its] emotive as [its] cognitive force" (*id.*). Not only does Section 42.09 not promote nationhood and unity, it imposes an impermissible burden upon the protected expression of artists. Thus, it does not survive the strict scrutiny required by the First Amendment.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted.

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January 25, 1989

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"U.S.A. Surpasses All The Genocide Records!",
George Machiunas, 1969. ..... 12a

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Flag Quilt, Anonymous, date unknown. 14a

"Flag for the Moon: Die Nigger", Faith Ringgold, 1969.
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Franco-Anglo-American Flag, Anonymous, 1918. ..... 16a

Folding Fan Displaying the Stars and Stripes With Pattern of Cuban Flag on Handles, 1902. ..... 17a

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John Heartfield, 1934. ..... 23a

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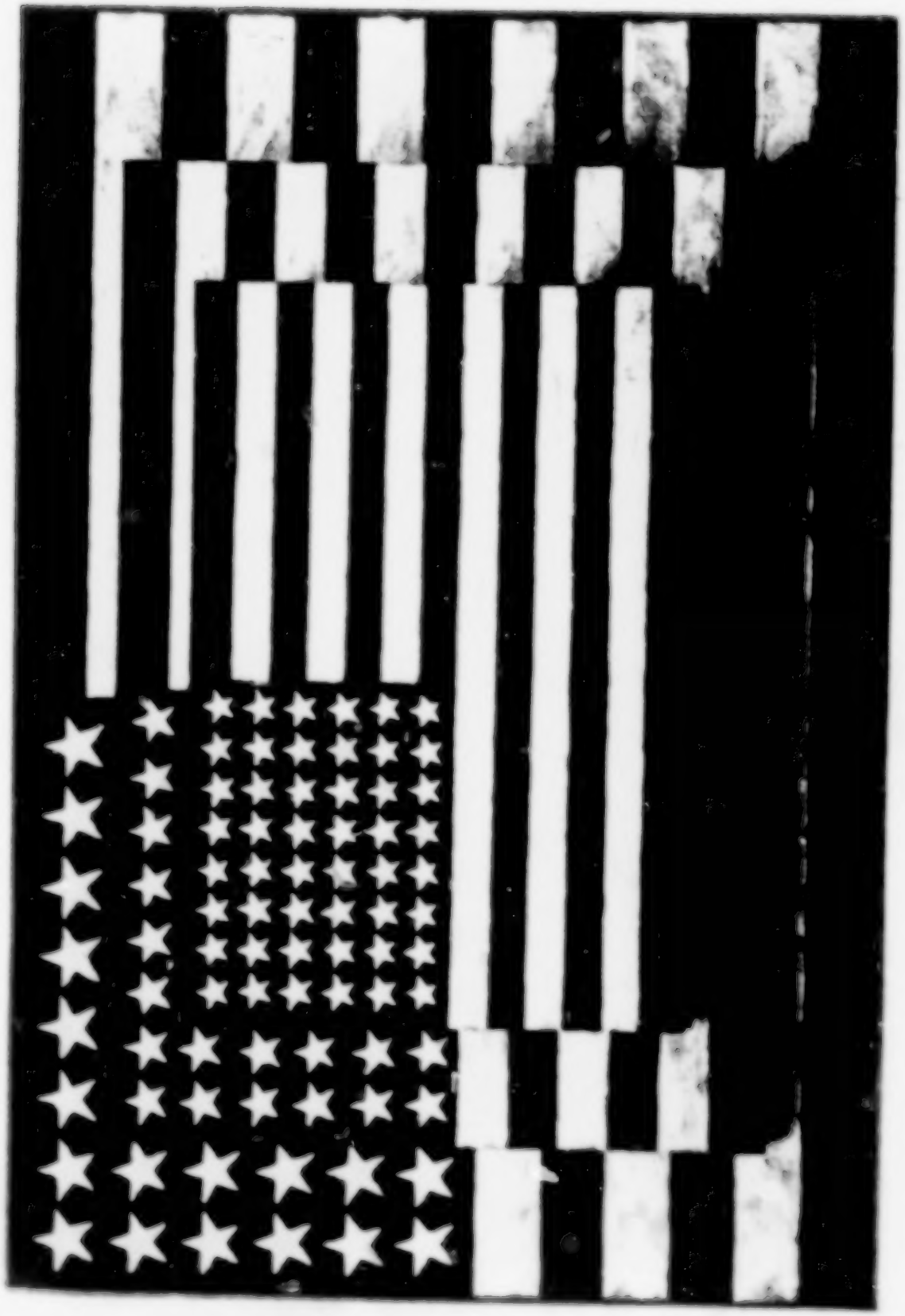
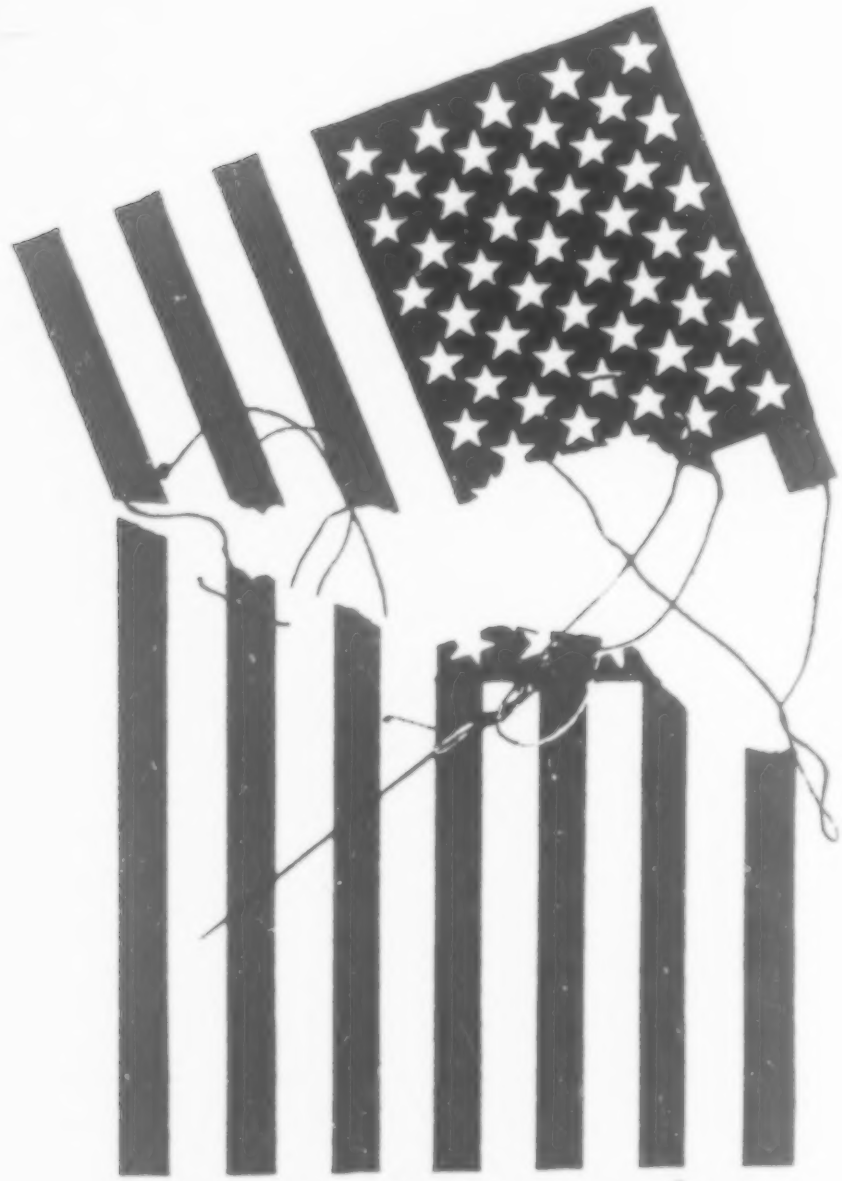


I pledge allegiance to the flag of the United States of America and
to the republic for which it stands, indivisible, with liberty and justice for all.

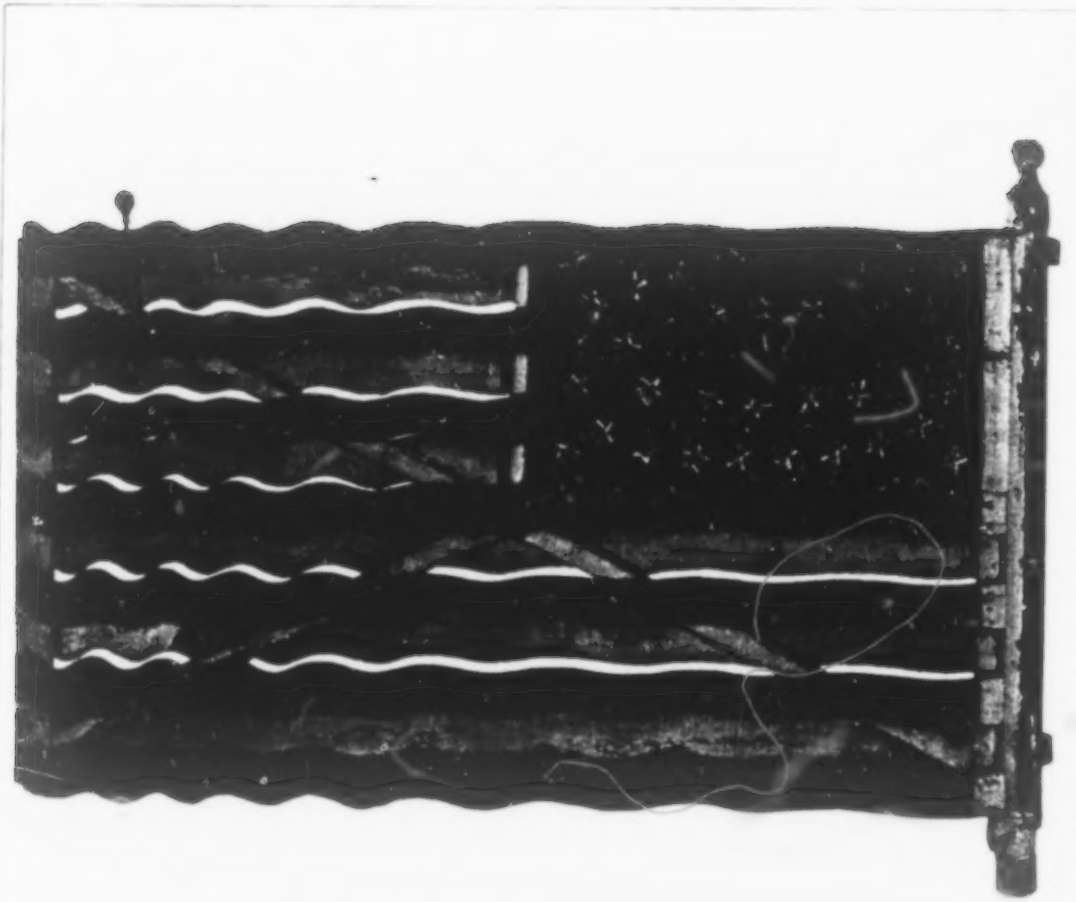
5a

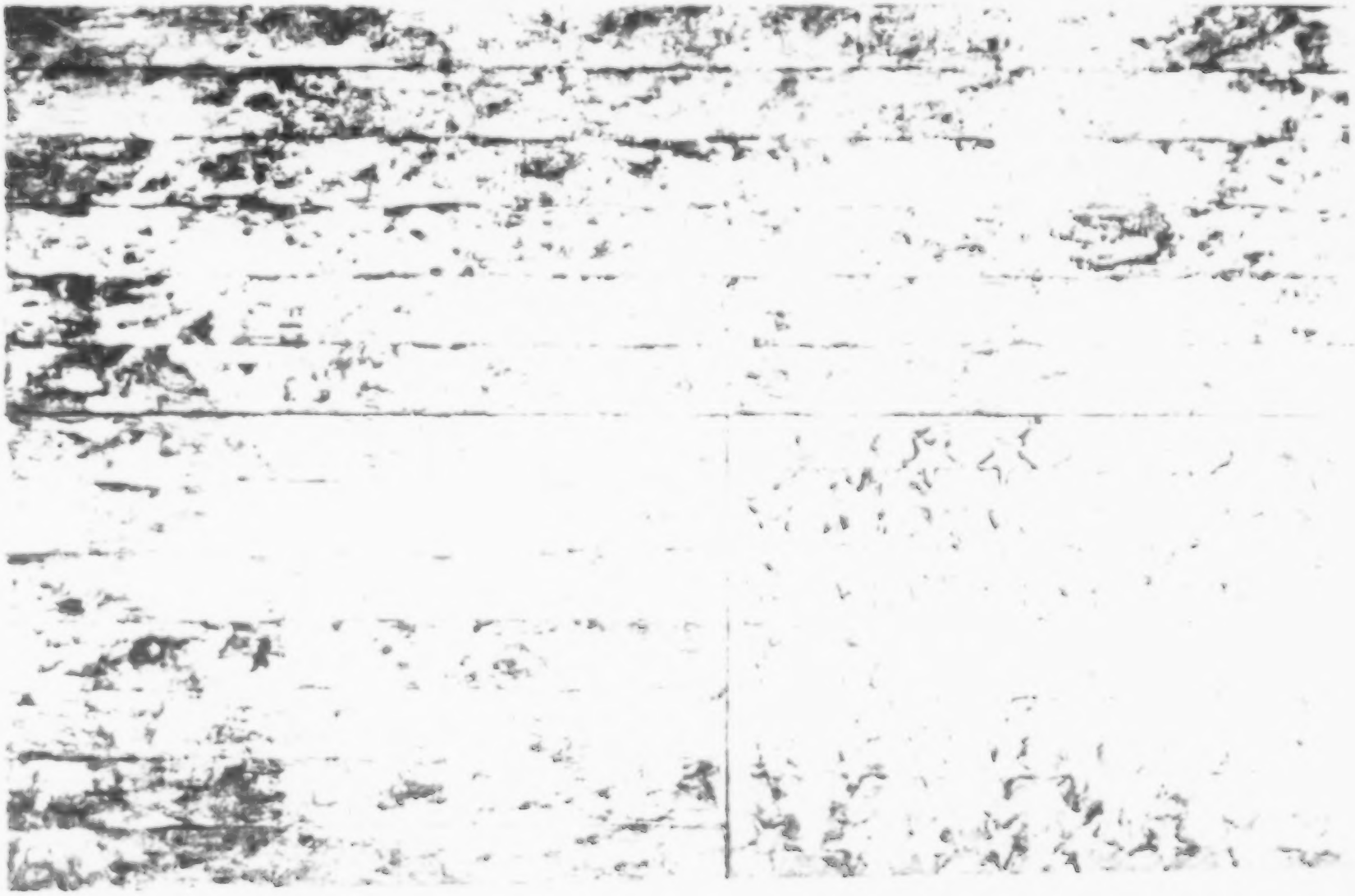
GIVE A DAMN



MEND AMERICA

"STEP RIGHT UP—EVERYBODY GETS ONE STAR AND PART OF A STRIPE"





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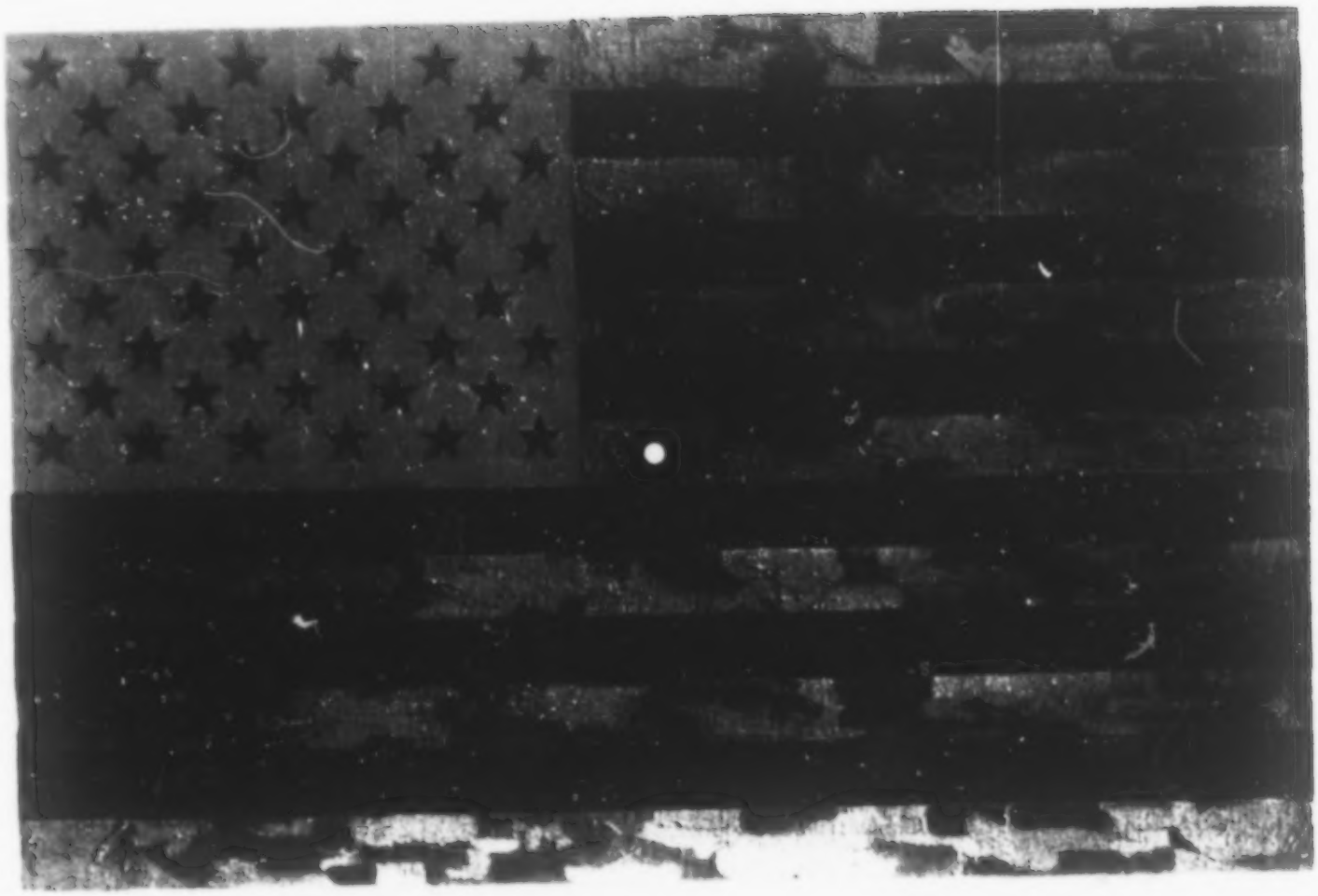
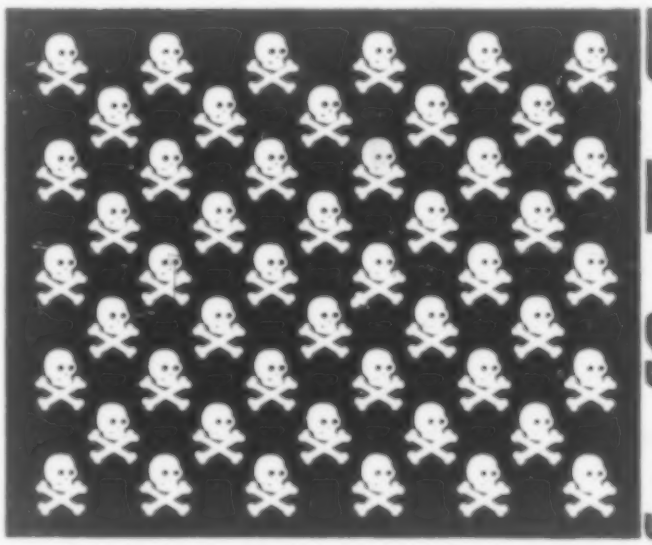
THE AMERICAN WAY OF DEATH



MORATORIUM



U.S.A. SURPASSES ALL THE GENOCIDE RECORDS!

KUBLAI KHAN MASSACRES 10% IN NEAR EAST

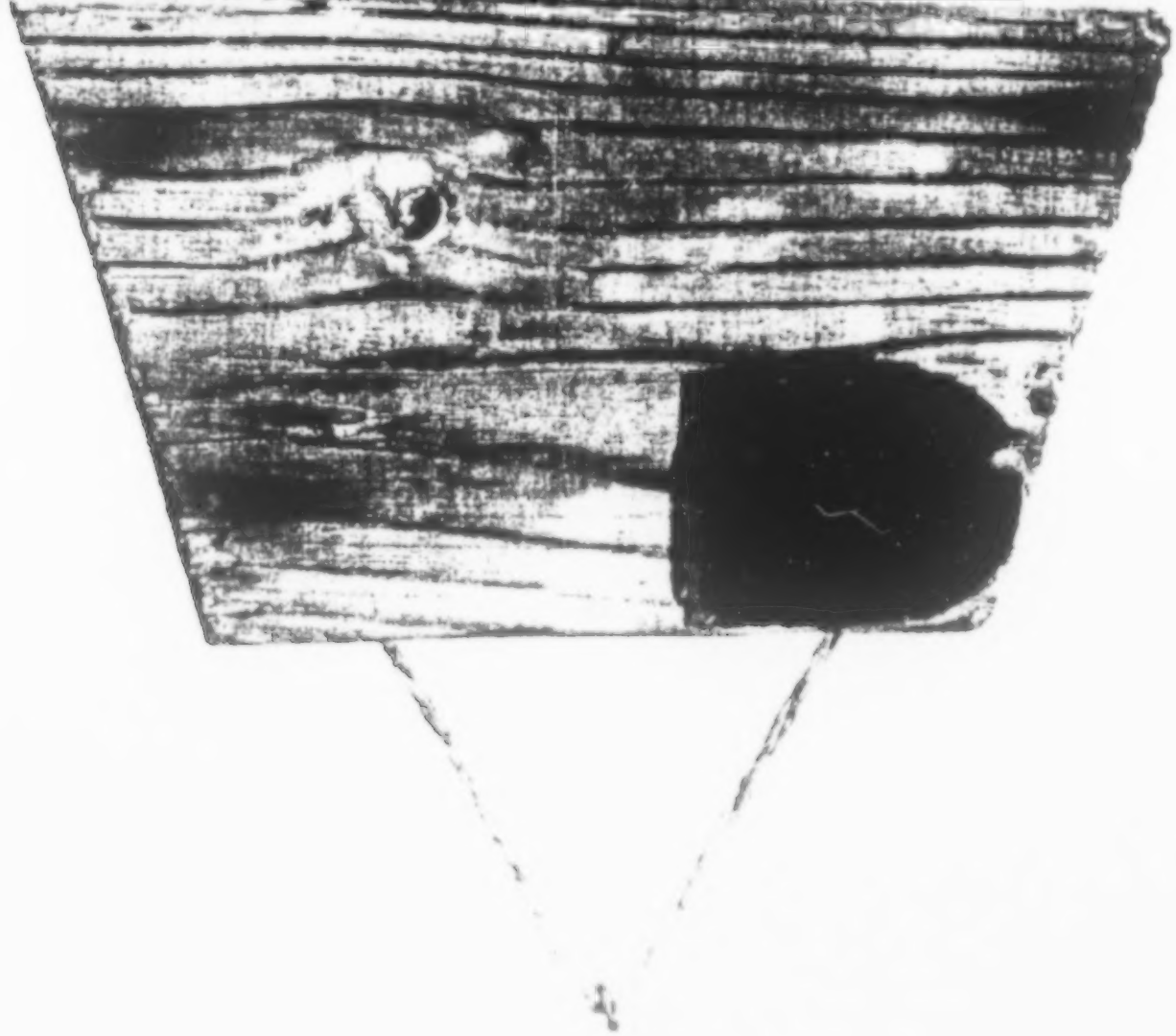
SPAIN MASSACRES 10% OF AMERICAN INDIANS

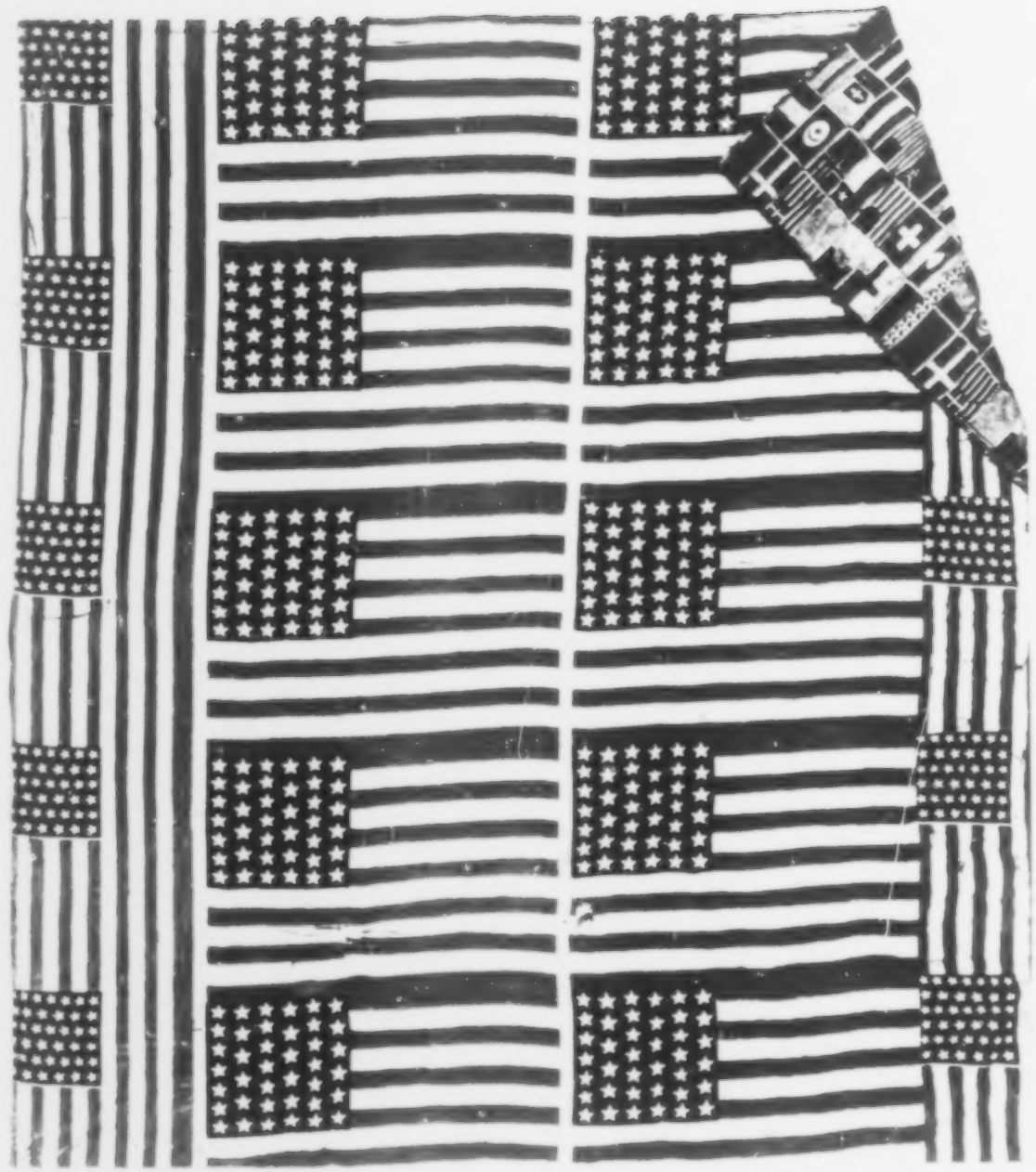
JOSEPH STALIN MASSACRES 5% OF RUSSIANS

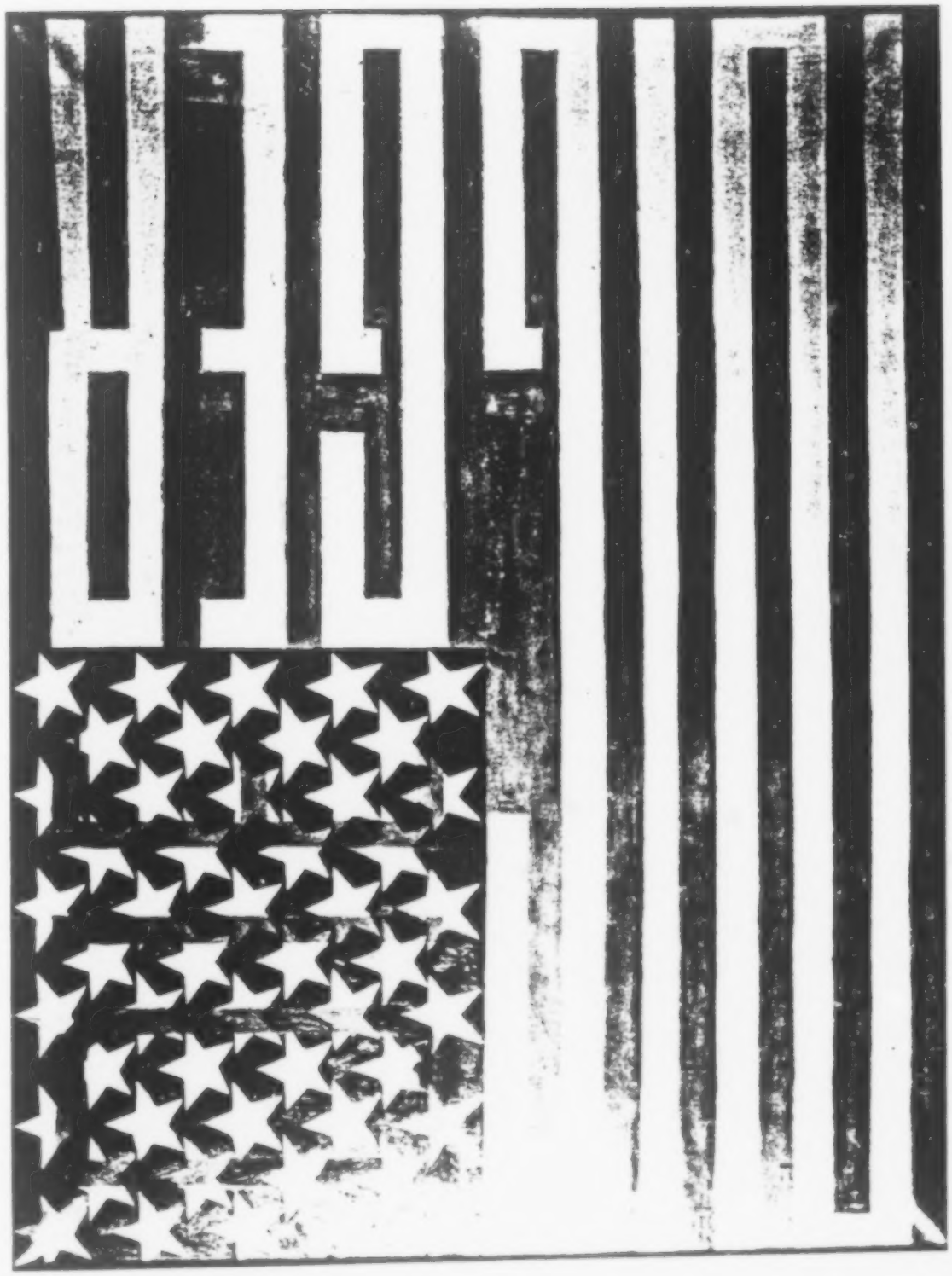
NAZIS MASSACRE 5% OF OCCUPIED EUROPEANS AND 75% OF EUROPEAN JEWS

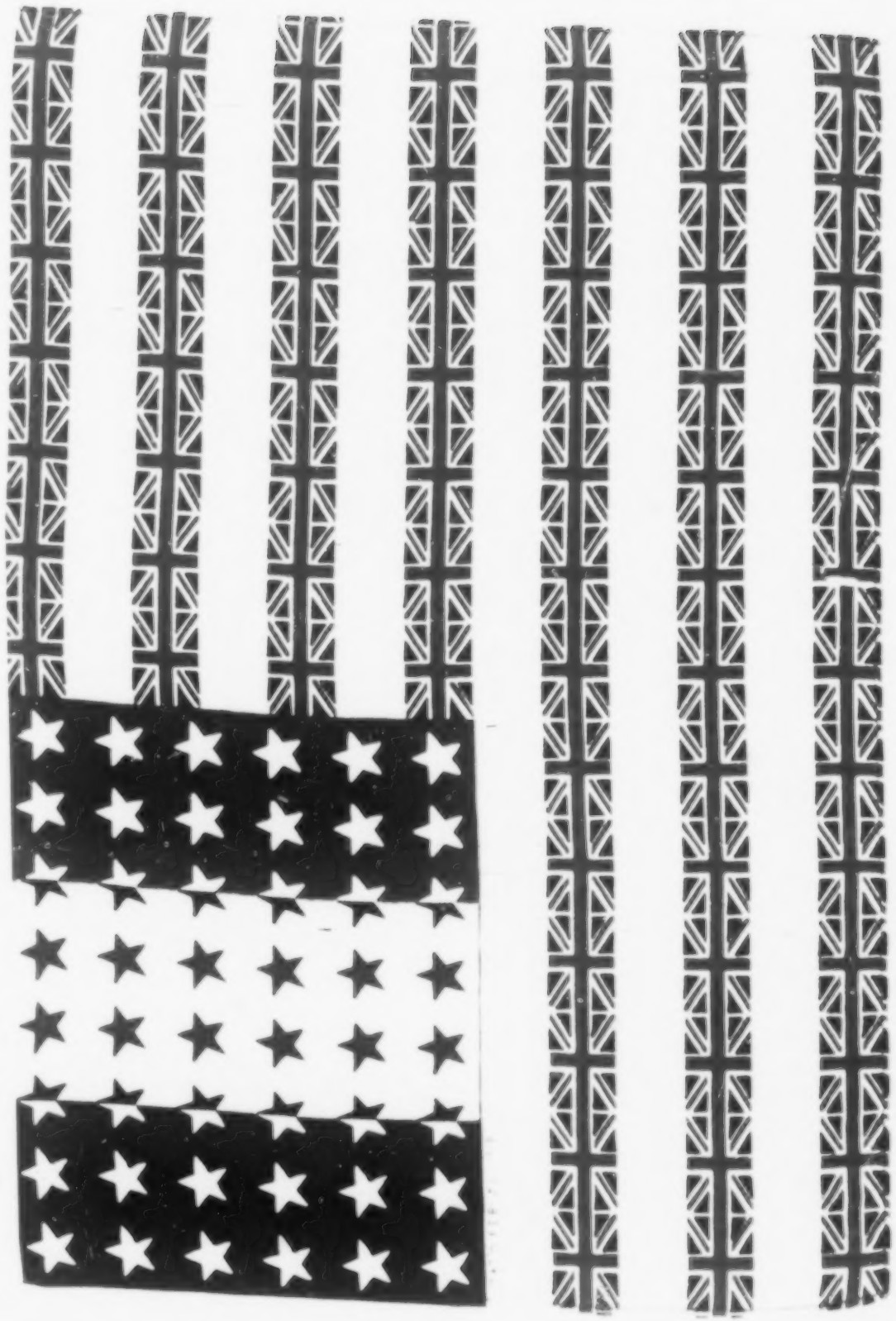
U.S.A. MASSACRES 6.5% OF SOUTH VIETNAMESE & 75% OF AMERICAN INDIANS

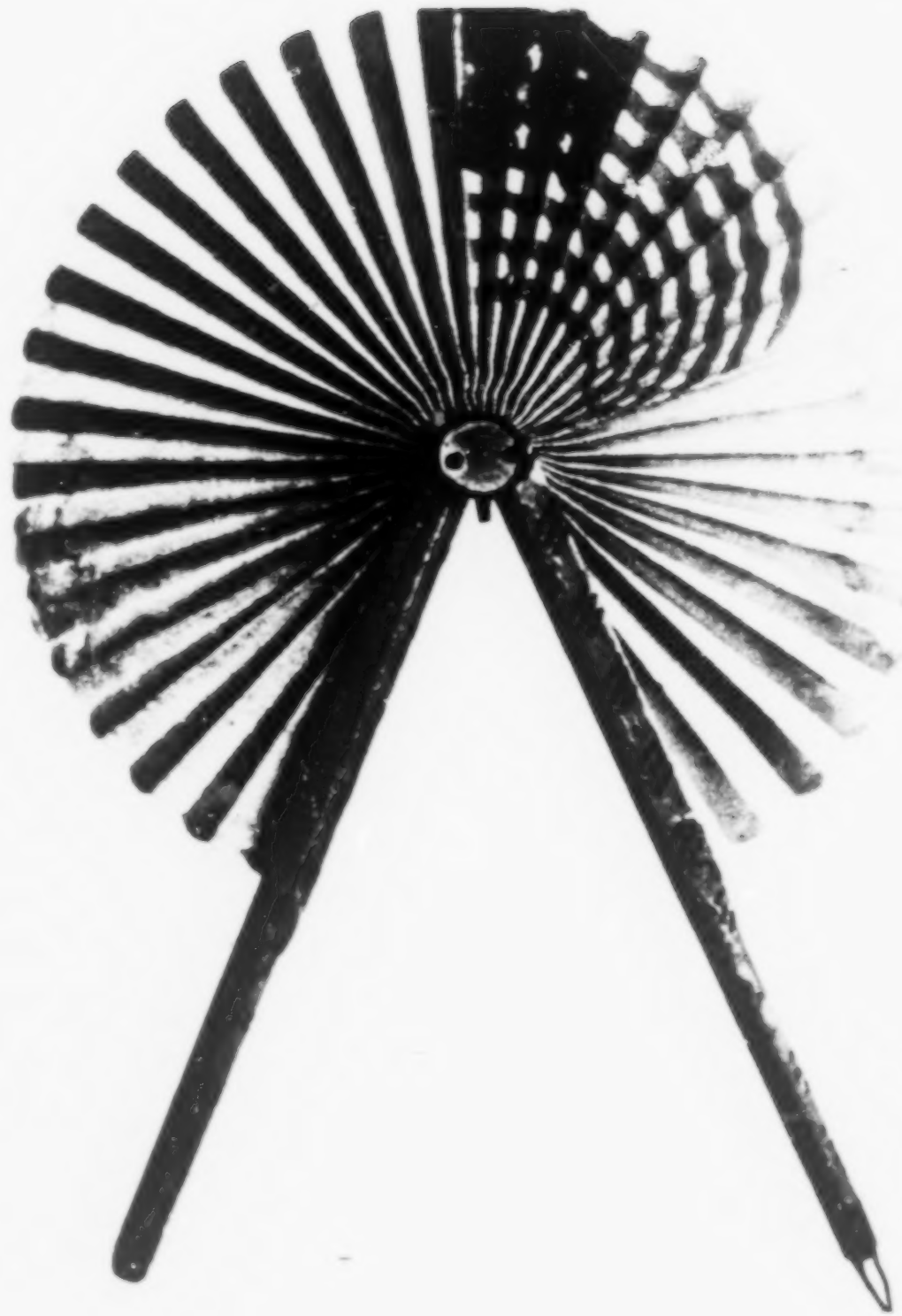
FOR CALCULATIONS & REFERENCES WRITE TO: P.O. BOX 180, NEW YORK, N.Y. 10013

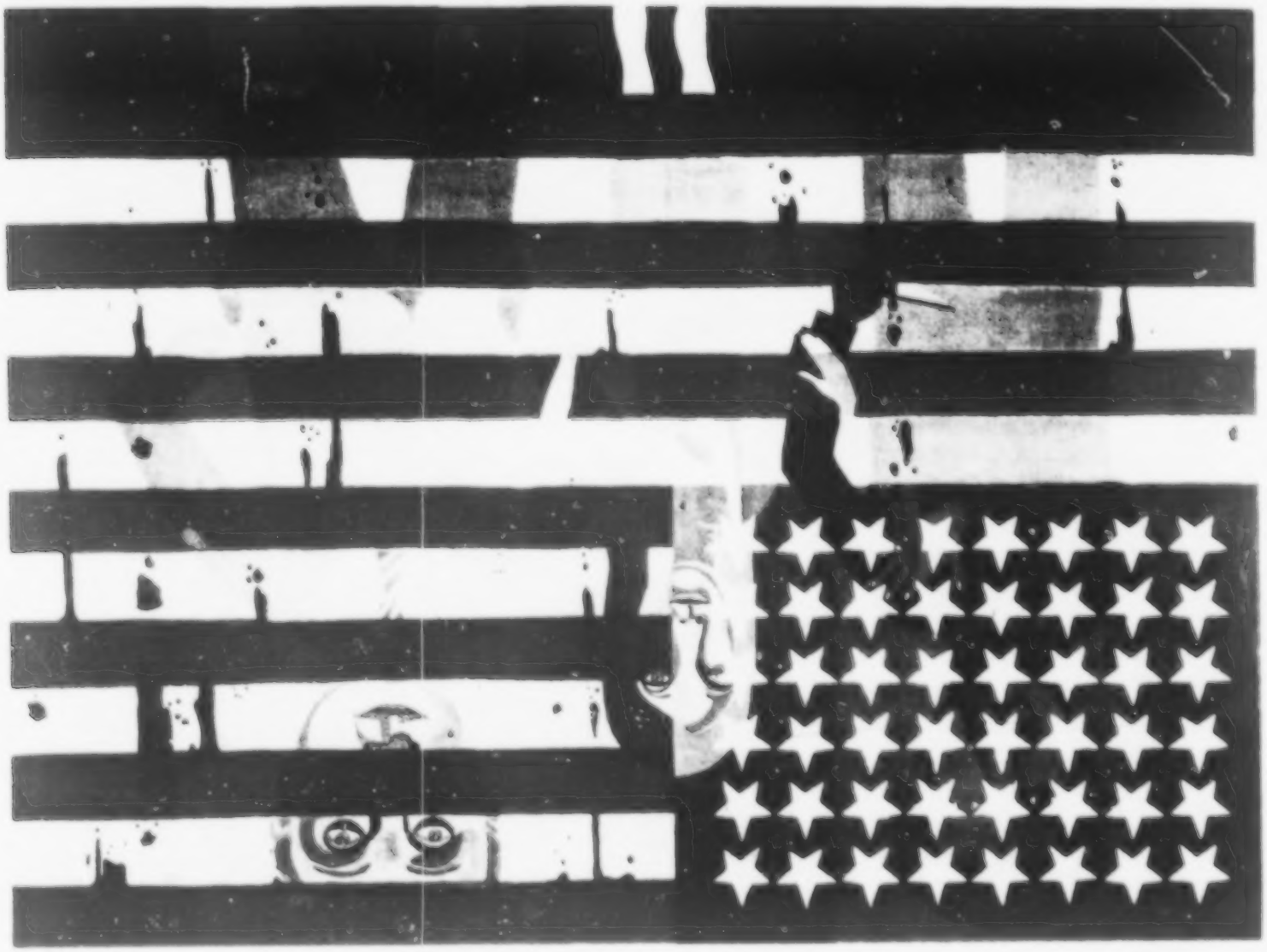




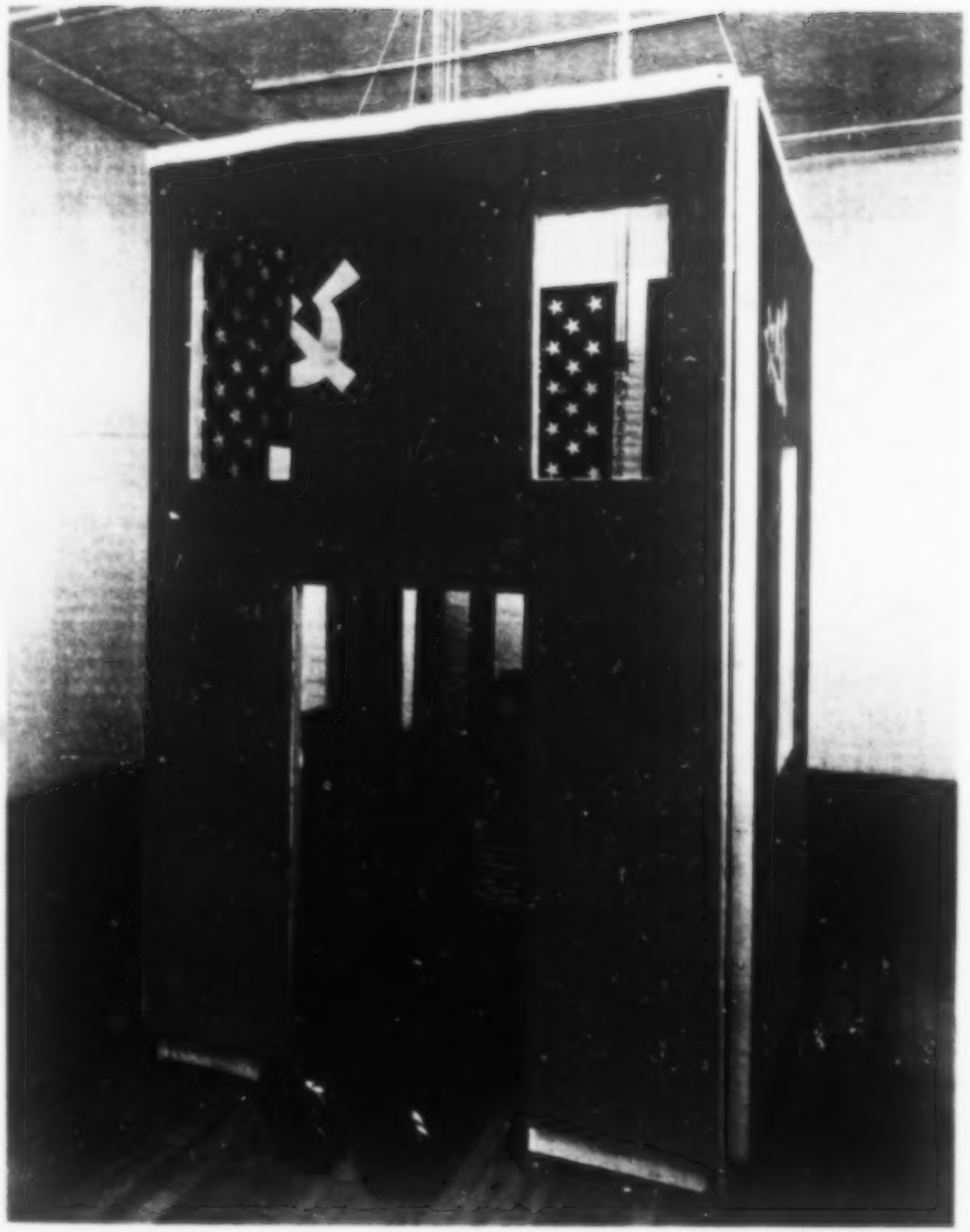








THE ALL-PURPOSE COVER



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